STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Honorable Jane M. Beckering, Stephen L. Borrello and Peter D. O'Connell

MATTHEW DYE, by his Guardian,
SIPORIN & ASSOCIATES, INC.,

Plaintiff/Cross Appellant & Cross Appellee,

v

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, PRIORITY HEALTH, BLUE CROSS BLUE SHIELD OF MICHIGAN, and GEICO INDEMNITY COMPANY,

Defendants

and

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant/Cross Plaintiff-Appellant,

v

GEICO INDEMNITY COMPANY,

Defendant/Cross Defendant Appellee & Cross Appellant.
_____/

Supreme Court No. 155784

Court of Appeals No. 330308

Circuit Court No. 14-516-NF

GEICO INDEMNITY COMPANY'S ANSWER TO MATTHEW DYE'S APPLICATION FOR LEAVE TO CROSS-APPEAL

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STATEMENT OF JURISDICTION

Appellee/Cross-Appellee/Cross-Appellant GEICO Indemnity Company ("GEICO") agrees that this Court has the discretion to consider Matthew Dye's Application for Leave to Cross-Appeal. Const 1963, art 6, § 4 and MCR 7.307(A). This cross-application was proper under MCR 7.307(A) as it came within 28 days of Appellee/Cross-Appellant Esurance Property & Casualty Insurance Company's ("Esurance") May 16, 2017 filing of an Application for Leave to Appeal from the same Court of Appeals decision (Ex. A attached to Dye's Cross-Application).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was *Barnes v Farmers Ins Exchange* correctly decided by the Court of Appeals under established canons of statutory construction?

Matthew Dye answered:	No.
Esurance answered:	No.
The Court of Appeals declined to address this question.	
GEICO answers:	*Yes.*

II. Was there an enforceable promise between Matthew Dye and GEICO so as to give rise to a waiver of GEICO's coverage defense under MCL 500.3113(b)?

Matthew Dye answered:	Yes.
Esurance did not answer this question.	
The Court of Appeals did not directly answer this question, but impliedly answered:	No.
GEICO answers:	*No.*

III. Did the Court of Appeals err in finding that a question of fact precluded summary disposition in favor of GEICO on the issue of whether Paul Dye was a co-owner of the 1997 BMW that Matthew Dye owned, failed to insure, and was operating at the time of his September 26, 2013 motor vehicle accident?

Matthew Dye answered:	No.
Esurance answered:	No.
The Court of Appeals answered:	No.
GEICO answers:	*Yes.*

INTRODUCTION

This lawsuit stems from a motor vehicle accident that occurred on September 26, 2013, in which Plaintiff-Appellee Matthew Dye sustained injuries. (Ex. A attached to Dye's Cross-Application, p 2.) Matthew Dye had been married to GEICO's insured, Lisa Dye, for approximately three and a half months before this accident occurred. (Id.) Neither he, nor the vehicle he was driving (a 1997 BMW that Matthew owned), were listed on the GEICO policy at the time of the loss. GEICO did not receive a premium for insuring this vehicle[1] and was not even aware that the 1997 BMW was a part of its insured's household until after the accident. On the other hand, Esurance insured Matthew Dye's father, Paul. (Ex. A attached to Dye's Cross-Application, p 2.) The Esurance policy listed the 1997 BMW, but Paul purchased the policy and was the only named insured under that policy. Ordinarily, Matthew would look to his own household first for PIP benefits, which would put GEICO first in priority under MCL 500.3114(1).[2] However, MCL 500.3113(b) requires that, because Matthew was injured while driving a vehicle he owned, that vehicle had to be insured *by an owner or registrant*; otherwise he is disqualified from receiving PIP benefits. Per the Court of Appeals' precedentially binding decision in *Barnes v Farmers Ins Exchange*, 308 Mich App 1; 862 NW2d 681 (2014), it not sufficient that *someone* insure the vehicle; § 3113(b) requires that insurance be maintained by an owner or registrant.

[1] "[I]t is impossible to hold an insurance company liable for a risk it did not assume." *Hunt v Drielick*, 496 Mich 366, 372-373; 852 NW2d 562 (2014).
[2] See *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990).

While Matthew's ownership of the vehicle was never disputed, Plaintiff claims that Paul was also an owner[3] of the 1997 BMW and therefore the insurance he purchased – which did not name Matthew – satisfies the statute. GEICO countered that this position was untenable in light of the deposition testimony. Paul did not contribute any money toward the purchase price. (Ex. A attached to Dye's Cross-Application, p 8.) Paul could not remember ever driving the vehicle. (Id., p 9.) Paul testified that if he had ever had a reason to use the 1997 BMW, he would have certainly asked Matthew's permission. (Id.) Paul did not have a set of keys. (Id.) Paul had no recollection of the vehicle ever being garaged at his home. (Id.) Paul testified that "it was basically Matthew's car … and when we registered it, we did so in his name." (See Ex. 2 attached to GEICO's Cross-Application, p 3.) Additionally, Matthew testified that he purchased the 1997 BMW with his own money, that he paid for all of the vehicle's fuel, that he would have paid for the maintenance had he owned the vehicle long enough, that the vehicle was never garaged at his father's house, and that his father did not have a set of keys. (Id., p 4)

At a hearing on October 22, 2015, trial court denied GEICO's Motion for Summary Disposition, and granted summary disposition in Matthew Dye's favor against GEICO. The trial court rejected GEICO's *Barnes* argument, finding that Paul Dye was both an owner and a registrant of the 1997 BMW. GEICO sought interlocutory review of those rulings, and on leave granted the Court of Appeals reversed, finding that Paul Dye was clearly not a registrant of the 1997 BMW (Ex. A attached to Dye's Cross-Application, p 6), but that there were questions of fact for the jury regarding whether Paul was a co-owner of that vehicle (Id., p 9).

[3] For purposes of the No-Fault Act, a motor vehicle may have more than one owner. *Ardt v Titan Ins Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999).

On May 16, 2017, Esurance applied for leave to appeal to this Court regarding an unrelated aspect of the Court of Appeals' April 4, 2017 opinion. On June 12, 2017, Matthew Dye filed an Application for Leave to Cross-Appeal with respect to the *Barnes*/ownership issue. The next day GEICO brought its own Application for Leave to Cross-Appeal, arguing that the Court of Appeals' majority opinion found illusory fact questions on the issue of ownership, contrary to *Maiden v Rozwood*, 461 Mich 109, 124 n 5; 597 NW2d 817 (1999).

GEICO files this brief in opposition to Matthew Dye's Application for Leave to Cross-Appeal. Matthew Dye raises two issues: (1) whether *Barnes* was correctly decided, and (2) whether GEICO "had by written admission agreed with Plaintiff, Matthew Dye … to provide no-fault coverage." (Dye's Cross-Application, pp i, 10, 23.) For reasons explained below, *Barnes* was correctly decided by the Court of Appeals under well-established canons of statutory construction, and there was no enforceable promise between Matthew Dye and GEICO so as to give rise to a waiver of GEICO's coverage defense under MCL 500.3113(b).

STATEMENT OF FACTS

On or about July 25, 2013, Plaintiff Matthew Dye purchased the aforementioned 1997 BMW. (See Ex. 2 attached to GEICO's Cross-Application, p 3.) Because the Plaintiff was in the process of moving, he granted his father Paul Dye power of attorney. (Id.) Pursuant to this, Paul Dye assisted in Matthew's purchase of the 1997 BMW by applying for the title, to be issued in Matthew's name (Ex. A attached to Dye's Cross-Application, p 6), and by purchasing insurance for the vehicle (Id., p 2). However, the insurance Paul purchased from Esurance identified Paul Dye as the only named insured, and did not identify any "rated operators." (Ex. 2 attached to GEICO's Cross-Application, p 3.)

Although Paul Dye helped Matthew with the purchase, it is undisputed that Plaintiff Matthew Dye was the owner of the 1997 BMW. As noted above, Paul did not contribute any money toward the purchase price. (Id.) Paul never drove the vehicle. (Id.) Paul testified that if he had ever had a reason to use the 1997 BMW, he would have certainly asked Matthew's permission. (Id.) Paul did not have a set of keys. (Ex. A attached to Dye's Cross-Application, pp 8-9.) Paul had no recollection of the vehicle ever being garaged at his home. (Id.) Paul testified that "it was basically Matthew's car … and when we registered it, we did so in his name." (Ex. 2 attached to GEICO's Cross-Application, p 3.) Additionally, Matthew testified that he purchased the 1997 BMW with his own money, that he paid for all of the vehicle's fuel, that he would have paid for the maintenance had he owned the vehicle long enough, that the vehicle was never garaged at his father's house, and that his father did not have a set of keys. (See Id., p 4.)

As noted above, on September 26, 2013, Matthew Dye was injured in an accident while driving the 1997 BMW. It is undisputed that at the time of the accident, the vehicle was not insured by Matthew Dye. (See Ex. A attached to Dye's Cross-Application, p 2.) The only existing insurance for the 1997 BMW was a policy issued by Esurance to Matthew's father. (Id.) Mathew Dye did not live with his father, but rather, at the time of the accident, Matthew lived with his wife, who insured a different vehicle through GEICO. (Id.) Matthew initially looked to Esurance, as the insurer of the 1997 BMW, for his PIP benefits (Id.) Esurance, in turn, pointed to GEICO as being first in priority, based upon Matthew's status as a resident relative of GEICO's insured, Lisa Dye. (Id.)

On September 9, 2015, GEICO filed separate Motions for Summary Disposition as to the Plaintiff Matthew Dye and as to Esurance.[4] Plaintiff and Esurance each filed responses and counter-requests for summary disposition under MCR 2.116(I)(2). The lower court heard all of these motions on October 22, 2015. (10/22/15 trans, p 6.) As it relates to this cross-application, GEICO's counsel argued that Paul did not have unfettered access to the vehicle and therefore did not satisfy the criteria for constructive "ownership" under the case law. As explained during the hearing, Paul did not contribute any money toward the purchase price. Paul never drove the vehicle. Paul testified that if he had ever had a reason to use the 1997 BMW, he would have certainly asked Matthew's permission. Paul did not have a set of keys. Paul had no recollection of the vehicle ever being garaged at his home. (Id., pp 25-27.) Additionally, Matthew testified that he purchased the 1997 BMW with his own money, that he paid for all of the vehicle's fuel, that he would have paid for the maintenance had he owned the vehicle long enough, that the vehicle was never garaged at his father's house, and that his father did not have a set of keys.

Plaintiff responded with testimony that Paul could have used the vehicle whenever he wanted (provided he asked Matthew and Matthew was not otherwise using it) as well as a family history of treating each other's vehicle's as a "family fleet" that they all shared (although the 1997 BMW itself was never actually shared and GEICO's counsel argued that it was therefore speculative whether this particular vehicle ever would have been treated as such). Matthew Dye's counsel also argued that Paul satisfied MCL 500.3101 – and in turn, MCL 500.3113(b) – because apart from whether he was an owner, he was a "registrant" of the 1997 BMW. GEICO's counsel responded that the Plaintiff's "registrant" argument is simply nonsense; Paul clearly

[4] The dispute between GEICO and Esurance is discussed in Esurance's Application for Leave to Appeal, filed with this Court on May 16, 2017, and in GEICO's answer to same, filed with this Court on June 6, 2017.

signed the application for title in his capacity as Matthew's attorney in fact; he printed Matthew's name and signed his own name below that with the designation "P/A." A handwritten "power of attorney" document was also attached. (See Ex. A attached to Dye's Cross-Application, p 6.) GEICO's counsel argued that if the Plaintiff's "registrant" argument is accepted, it would nullify the very concept of a power of attorney.

The trial court granted the Plaintiff's Motion for Summary Disposition on this issue and denied GEICO's, finding that Paul was an "owner" of the 1997 BMW and that GEICO therefore has no coverage defense under *Barnes.* (10/22/15 trans, pp 27-28.) Surprisingly, Judge Connors further found that Paul was a "registrant" of the 1997 BMW. (Id.) GEICO timely applied for leave to appeal, which the Court of Appeals granted on April 5, 2016. (See Ex. A attached to Dye's Cross-Application, p 1 n 1.) After hearing oral argument on March 15, 2017, the panel reversed in an opinion issued on April 4, 2017. Although the panel unanimously reversed the summary disposition ruling in Matthew Dye's favor, the majority found that questions of fact precluded the entry of summary disposition in GEICO's favor on the ownership issue. (Id., p 9.) The panel explained:

> In the case at bar, Geico contends that Paul's use of the BMW was sporadic and incidental at best. Paul did not contribute to the BMW's purchase price, could not remember driving it, could not remember garaging it, did not have his own set of keys to the car, and said he would ask plaintiff's permission if he ever had reason to use it. The trial court, however, found dispositive the deposition testimony of plaintiff and Paul asserting Paul's continuous right to use the BMW.
>
> Indeed, both plaintiff and Paul testified that Paul could use the car at his discretion and without direction or permission from anyone. Although Paul testified that he would ask first before swapping vehicles, his and plaintiff's testimony indicates that obtaining permission was more for the purpose of coordinating use of the vehicles and respecting the rights of others than for asking for the right to use an otherwise available vehicle. In addition, … there

was a significant relationship between Paul and plaintiff. The relationship appears to have been close, both geographically, as Paul lived only a few blocks from plaintiff, and personal, as Paul served as plaintiff's attorney-in-fact for plaintiff's personal business matters during plaintiff's deployment to Afghanistan and assisted him in like matters thereafter. Moreover, Paul undertook to register the BMW with the Secretary of State's Office, albeit on plaintiff's behalf, but he also paid the registration fee and the insurance premium. Plaintiff also testified that he considered Paul to be a "part owner." The continuous nature of Paul's right to use the BMW, testimony asserting his right to use the car at his discretion, the broader context of plaintiff's and Paul's relationship, and their history of shared vehicle usage supports the trial court's finding that Paul was an owner for purposes of the no-fault act.

Nevertheless, as Geico points out, Paul did not have his own set of keys and, although plaintiff testified that a spare set was available to Paul to take and use at will, reasonable minds could differ as to whether the nature of Paul's access to the keys supported or hindered a proprietary or possessory use of the BMW. In addition, reasonable minds could differ as to whether Paul's actual usage of the BMW during the two months prior to the accident sufficiently establishes a pattern of regular usage. The testimony itself is somewhat conflicting; Paul could not remember driving or parking the car at his house during the two months since it had been purchased, but plaintiff remembered that Paul had kept the car overnight, and Lisa remembered that Paul had driven it once or twice for a day or two during the two months that they had the car. Lisa's description of Paul's use of the car might signify a "spotty and exceptional pattern," and her testimony that Paul used the car because they needed to use his vehicle appears to be usage that was "merely incidental" rather than "proprietary or possessory." … However, plaintiff only had the car for two months, and it might be questionable whether a pattern of any sort could arise during such a short period. …[W]hen determining whether a person is an owner for purposes of the no-fault act, a person's actual usage of a vehicle is analytically subordinate to the nature of a person's right to use the vehicle.

The relationship between plaintiff and Paul, their history of sharing vehicles, and testimony regarding the nature of Paul's continuous right to use the BMW without direction or permission may support the trial court's finding that Paul is an owner for purposes of the no-fault act. However, circumstances surrounding Paul's access to the car keys and the actual usage Paul made of the car during the two months prior to the accident could lead a reasonable juror to a

> contrary conclusion. Accordingly, we conclude that the trial court erred in granting plaintiff summary disposition, as reasonable minds could differ as to whether Paul was an owner of the BMW…. (Ex. A attached to Dye's Cross-Application, pp 8-9, citations omitted.)

Judge Peter O'Connell dissented "as to the majority's conclusion that Paul Dye may qualify as an owner of this vehicle. Based upon these set of facts, Matthew Dye is both the registrant and owner of this vehicle." (Id.)

STANDARDS OF REVIEW

There are two standards of review applicable to the instant Application for Leave to Appeal. MCR 7.305(B) sets out specific criteria for the granting of an application for leave to appeal to this Court. This rule states, in relevant part, that an application to this Court "must show" at least one of the following: "(3) the issue involves legal principles of major significance to the state's jurisprudence; [or] … (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice…." MCR 7.305(B). While the proper interpretation of MCL 500.3113(b) fits this description, Matthew Dye's Argument II does not satisfy these criteria. Matthew Dye asks this Court to review an extremely case and fact-specific argument that neither the trial court nor the Court of Appeals directly addressed. Indeed, this "written admission" argument would have only had statewide jurisprudential significance if Matthew Dye's position had been accepted, as this would have had a chilling effect on settlement negotiations in any civil litigation, and flouted the centuries-old elements of a contract: offer, acceptance, and consideration.

The second standard of review relates to the actual decision of the court below that is the subject of the Application. Both Matthew Dye and GEICO moved for summary disposition on the ownership issue under MCR 2.116(C)(10). Decisions to grant or deny motions for summary

disposition under (C)(10) are reviewed on appeal *de novo*. *Maiden*, 461 Mich at 118. If leave were granted, the underlying questions of statutory construction would likewise be reviewed *de novo*. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412, 415 (2012).

ARGUMENT

I. *Barnes v Farmers Ins Exchange* was correctly decided by the Court of Appeals under well-established canons of statutory construction.

MCL 500.3113(b) states that a "person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident … [t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 31031 was not in effect." This provision is subject to ordinary rules of statutory construction. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 527–528; 676 NW2d 616 (2004). "In reviewing questions of statutory construction, [a court's] purpose is to discern and give effect to the Legislature's intent." *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written." *Id.* "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent." *Id.* Courts may not "rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Courts have "no authority to add words or conditions to [a] statute." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214 n 10; 731 NW2d 41 (2007).

"[T]he policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). "The

Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written." *Id.* at 425. The "Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature." *Id.* (citation omitted). Even when "the Legislature's policy choice can be debated," the "judiciary is not the constitutional venue for such a debate." *Id.*

Or as this Court explained in *Cameron v Auto Club Ins Ass'n,* 476 Mich 55, 64; 718 NW2d 784 (2006), litigants cannot ask "that all the disciplines that judges, lawyers, and even lay people use for giving meaning to documents and distinguishing in a principled fashion between potentially conflicting instruments … be disregarded" so that courts can "raise our eyes from the tedious page, weigh who is the most compelling litigant, and 'effect legislative intent.'" Such arguments beg "the question … of why the words the Legislature used do not do that better than their efforts to find the 'real intent.'" *Id.* "Moreover, with a system of mandatory automobile no-fault insurance such as the Legislature has enacted, it just may be, because of the economies required to make it work, that the Legislature's 'real intent' was to set up strict rules that can unfortunately, but unavoidably if you want no-fault insurance, produce some sad outcomes." *Id.*[5]

The purpose of the No-Fault Act "is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group,* 278 Mich App 31, 37; 748 NW2d 574 (2008). The No-Fault Act, however, requires the "owner or registrant" of a vehicle to maintain "personal protection insurance [PIP], property protection insurance, and

[5] Although *Cameron* was overruled by *Univ of Mich Regents v Titan Ins Co,* 488 Mich 893, 794 NW2d 570 (2010), *Cameron* was expressly reinstated by *Joseph*, 491 Mich at 221.

residual liability insurance." MCL 500.3101(1). The No-Fault Act provides a consequence in the event that the required insurance is lacking. MCL 500.3113 provides that "A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed: … (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect."

The issue presented in *Barnes* was whether MCL 500.3113(b) barred plaintiff's receipt of PIP benefits where the vehicle plaintiff was driving at the time of the accident was insured by someone, but not an owner. The plaintiff in *Barnes* cited *Iqbal* for the proposition that she could recover as an owner as long as *anyone* has insurance on the vehicle. The *Barnes* panel rejected this argument.

In *Iqbal*, the plaintiff was injured while driving a car that was titled and registered only in his brother's name. The brother insured the car through Auto Club Insurance Association. The plaintiff lived with his sister, who had a household no-fault insurance policy issued by Bristol West Insurance Group. The plaintiff sought PIP benefits. Following the trial court's determination that Bristol had priority to handle the claim, Bristol argued that the plaintiff should be precluded from receiving PIP benefits under MCL 500.3113(b) because the plaintiff was an "owner" of the car (he had primary possession of it) and he did not insure the car himself. The trial court ruled that whether the plaintiff was an "owner" under MCL 500.3101(2) was irrelevant because the car indisputably was insured by the brother, who was an owner. *Iqbal*, 278 Mich App at 33–36.

The *Iqbal* panel agreed that the plaintiff was not precluded from receiving PIP benefits under MCL 500.3113(b). The *Iqbal* panel assumed that the plaintiff was an owner and held:

> the phrase "with respect to which the security required by section 3101...was not in effect," § 3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the motor vehicle involved in the accident, here the BMW, and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101.... While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff. *Iqbal*, 278 Mich App at 39-40 (emphasis added).

Some construed *Iqbal* to say that § 3113(b) would not bar a claimant so long as someone had insurance in place for the vehicle at the time of the accident. But *Barnes* clarified that § 3113(b) – through its reference to "the security required by section 3101" – requires that the person who secures insurance for the vehicle *be an owner*. *Barnes* arose out of an automobile accident in which the plaintiff was injured while driving a 2004 Chevrolet Cavalier. Plaintiff and her mother, Joyce Burton, who lived together in the same house in Detroit, indisputably were the only titled owners of the Cavalier at the time of the accident. Burton originally insured the Cavalier under an Allstate insurance policy. But she allowed that policy to lapse after health problems resulted in the amputation of both her legs, leaving her unable to drive. Thereafter, Burton requested that Richard Huling, a close friend from her church, use the Cavalier to drive her to and from frequent church visits. Burton testified that she paid Huling to insure the Cavalier and that Huling bought a State Farm auto policy in 2008. It was undisputed that no one else besides Huling had insurance on the vehicle.

The plaintiff in *Barnes* cited *Iqbal* and argued that the fact that neither she nor Burton insured the Cavalier did not matter because Huling did. Plaintiff contended that this was so regardless of whether Huling was an owner of the Cavalier. But the *Barnes* panel disagreed, finding that "*Iqbal* should not be read so broadly to apply to even non-owners." *Barnes*, 308 Mich App at 8. According to the *Barnes* panel, *Iqbal* was not controlling because the *Iqbal* opinion "made it clear that it was addressing the problem of requiring 'each and every owner' to maintain insurance on a vehicle." *Barnes*, 308 Mich App at 8. *Iqbal* found that every owner could not be required to maintain insurance because otherwise, an owner who obtained insurance could be precluded from receiving PIP benefits if any other co-owner did not maintain coverage as well. This was not the situation in *Barnes*, where *no owner* insured the vehicle.

Barnes went on to explain that all of the other published cases had "involved at least one owner having obtained the insurance coverage." *Barnes*, 308 Mich App at 8. Also, allowing insurance purchased by a non-owner to relieve an owner from the consequences of § 3113(b) "would render MCL 500.3101(1)'s language requiring '[t]he owner or registrant' of a vehicle to maintain insurance nugatory, which is not favored." *Barnes*, 308 Mich App at 8. *Barnes* further explained:

> …while *Iqbal* held that each and every owner need not obtain insurance, it did not allow for owners to avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance. **Thus, under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits.** And because it is undisputed that the only coverage was supplied by Huling, who had been deemed to not be an owner, plaintiff is precluded from recovering PIP benefits pursuant to the no-fault act. *Barnes*, 308 Mich App at 8-9 (emphasis added).

Barnes is now a three-year old precedent. No subsequent panel of the Court of Appeals has expressed disagreement with it – including the panel in this case, despite Matthew Dye and

Esurance's requests for a conflict panel under MCR 7.215(J)(2). The Court of Appeals recently followed *Barnes* unanimously and without reservation in *Colvin v Trumbull Ins Co,* unpublished memorandum opinion of the Court of Appeals, issued May 12, 2017 (Docket No. 336640) (Ex. A). *Barnes* was also followed without any apparent reservation in *Adams v Curtis*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2017 (Docket No. 330999) (Ex. B)[6] and *Beaumont Health Sys v State Farm Mut Auto Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued November 8, 2016 (Docket No.s 328291, 329103) (Ex. C).[7] The fact that *Adams* and *Beaumont Health Sys* were both unanimous decisions, where the plaintiffs did not file a leave application to this Court, belies Matthew Dye's assertion that *Barnes* is somehow a tenuous or controversial precedent.

II. There was no enforceable promise between Matthew Dye and GEICO so as to give rise to a waiver of GEICO's coverage defense under MCL 500.3113(b).

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (citation omitted). "Before a contract can be completed, there must be an offer and acceptance." *Id.* "Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id.* "Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Id.* at 453.

[6] "If a vehicle is not insured by an owner (titled or constructive), then the vehicle cannot be properly insured under Michigan law. …[I]t is not sufficient for a non-owner to insure a vehicle…." *Adams,* unpub op at 3.

[7] "*Barnes* [and *Iqbal*] … evince this Court's consistent position that when an owner insures a car, then any other owner is entitled to PIP benefits under the security obtained for the car, but when no owner insures the car, then any owner is not entitled to PIP benefits." *Beaumont Health Sys,* unpub op at 4.

"A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Mem'l Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992) (citations omitted). "An offer is a unilateral declaration of intention, and is not a contract." *Id.* at 549. "A contract is made when both parties have executed or accepted it, and not before." *Id.* "A counter proposition is not an acceptance." *Id.* "Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." *Id.* (citations omitted).

"A mere expression of intention does not make a binding contract…." *Id.* "The burden is on plaintiffs to show the existence of the contract sought to be enforced, and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the court cannot make a contract for the parties when none exists." *Id.*, quoting *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960).

"A contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of MCR 2.507(H)." *Kloian*, 273 Mich App at 456. MCR 2.507(G), entitled "Agreements to be in Writing," states: "An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." This provision has been characterized as "a court rule version of a statute of frauds governing legal proceedings." *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 435; 546 NW2d 641 (1996). The rule has been held to apply to settlement agreements. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999).

There is no allegation that Matthew Dye and GEICO entered into an agreement in "open court." Therefore, we look to whether there is "evidence of the agreement…in writing, subscribed by" GEICO or its attorney. Matthew Dye relies solely upon a September 2, 2014 letter from GEICO's attorney which simply acknowledges that GEICO would be first in priority (rather than Esurance),[8] and invites Matthew Dye's counsel to submit a demand. (Dye's Cross-Application, p 24.) The letter did not mention a dollar figure, and there was never a substantive response from the Plaintiff. Matthew Dye points to an invitation to bargain which Plaintiff's counsel never accepted. Matthew Dye did not claim that any consideration was exchanged or that he detrimentally relied in any way upon GEICO's letter. A "court cannot 'force' settlements upon parties," or "enter an order pursuant to the consent of the parties which deviates in any material respect from the agreement of the parties." *Kloian,* 273 Mich App at 461.

To deprive GEICO of its *Barnes* defense here, simply because it invited Plaintiff's counsel to engage in settlement discussions, would have a chilling effect on such discussions throughout the State. The elements of a contract – offer, acceptance, and consideration – simply are not present. GEICO's counsel's statement that it was "accepting responsibility" simply meant that it was no longer contesting priority – just one of several potential defenses to a no-fault claim. A whole host of issues still needed to be resolved before the Matthew Dye-GEICO dispute could be resolved. See *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49; 457 NW2d 637 (1990). For example, no-fault benefits are not compensable unless and until the insurer is provided with "reasonable proof of the fact and of the amount of loss sustained."

[8] This is what the phrase "accepted responsibility" refers to in the context of this case; GEICO was accepting responsibility for the defense/adjustment of Dye's claim, not necessarily *for paying it*. Otherwise, Dye's counsel could have responded to this letter with a request for a billion dollars and under Dye's theory, GEICO would have been contractually responsible for paying that amount.

MCL 500.3142(2). See also *Neumann v State Farm,* 180 Mich App 479; 447 NW2d 786 (1989). Indeed, in *Williams v AAA Michigan,* 250 Mich App 249, 258; 646 NW2d 476 (2002) this Court specifically noted that "[t]o be reimbursed [for no-fault benefits] … *a plaintiff bears the burden* of proving that (1) the charge for the service was reasonable, (2) the expense was reasonably necessary and (3) the expense was incurred." (Emphasis added.) Additionally, *University of Michigan Regents v State Farm,* 250 Mich App 719, 736; 650 NW2d 129 (2002) confirms that a no-fault carrier's duty under the Act is not triggered unless and until it receives *both* "reasonable proof of the fact that a loss was sustained" *and* "the amount of the loss sustained." Moreover, *Moore v Secura Ins,* 482 Mich 507, 523; 759 NW2d 833 (2008) held that "[u]nder the plain language of the statute, the claimant shoulders the initial burden to supply reasonable proof of her entire claim, or reasonable proof for some portion thereof." GEICO simply asked Plaintiff's counsel, in the September 2, 2014 letter, to provide it with some idea of how much was in dispute. GEICO's letter was an "invitation to bargain"[9] which could not itself be accepted. Plaintiff's counsel declined the invitation.

Again, a stipulation to settle a lawsuit, or in this case, part of a lawsuit, is a contract, governed by the legal principles applicable to the construction and interpretation of contracts. *Eaton County Road Com'rs v Schultz,* 205 Mich App 371, 379; 521 NW2d 847 (1994). It is hornbook law that a valid contract requires a "meeting of the minds" on all the essential terms. *Kamalnath v Mercy Memorial Hosp Corp,* 194 Mich App 543, 548; 487 NW2d 499 (1992). There can be no contract if there is no meeting of the minds between the parties. *46th Circuit Trial Court v Crawford Co,* 476 Mich 131, 158-159; 719 NW2d 553 (2006). As this Court noted in *Kirchhoff v Morris,* 282 Mich 90, 95; 275 NW 778 (1937):

[9] See *Cohen Dev Co v Jmj Props,* 317 F3d 729, 736 (7th Cir 2003).

> It is fundamental that certain elements are necessary to make a contract. There must be, among other things, an offer and acceptance, as well as a consideration. Mere discussions and negotiations, or even unaccepted offers of settlement, cannot be a substitute for the formal requirements of the contract.

Here, the September 2, 2014 letter from GEICO's counsel, asking Plaintiff's counsel to make a "demand to settle" (Dye's Cross-Application, p 24), did not even rise to the level of an offer that Matthew Dye could have accepted, had his attorney responded (which he did not). Matthew Dye's argument that this letter created an enforceable promise is contrary to the objective theory of contract, which has been adopted by this Court. *Rood v Gen Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993). As explained in *Rood*:

> In deciding whether a party has assented to a contract, we follow the objective theory of assent, focusing on how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct. … Since it is difficult for a workable system of contract law to take account of assent unless there has been an overt expression of it, courts have required that assent to the formation of a contract be manifested in some way, by words or other conduct, if it is to be effective.
>
> Otherwise stated, to determine whether there was mutual assent to a contract, we use an objective test, looking to the expressed words of the parties and their visible acts, and ask whether a reasonable person could have interpreted the words or conduct in the manner that is alleged. Thus, we begin our analysis by looking to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent….
>
> Agreement consists of mutual expressions; it does not consist of harmonious intentions or states of mind. …At present, however, what we observe for judicial purposes is the conduct of the parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called agreement. … This is what is meant by mutual assent. *Id.*

Here, there was no manifestation of the parties' intent to settle the Matthew Dye-GEICO dispute, as confirmed by the fact that Matthew Dye cannot even say how much that portion of the case supposedly "settled" for.

III. The Court of Appeals erred in finding that a question of fact precluded summary disposition in favor of GEICO on the issue of whether Paul Dye was a co-owner of the 1997 BMW that Matthew Dye owned, failed to insure, and was operating at the time of his September 26, 2013 motor vehicle accident.

Under *Barnes*, the insurance purchased by Paul Dye – which named only Paul Dye as an insured (Ex. A attached to Dye's Cross-Application, p 2) – does not allow Matthew Dye to "avoid the consequences of MCL 500.3113(b)" unless his father Paul Dye was a co-owner. A person's status as an "owner" within the meaning of the No-Fault Act is determined by reference to MCL 500.3101(2)(k), which states in relevant part: "'Owner' means any of the following: …(i) A person renting a motor vehicle *or having the use thereof,* under a lease **or** *otherwise, for a period that is greater than 30 days*…" (Emphasis added). "The purpose of [this] statute is…to place the risk of damage or injury upon the person who has ultimate control of a vehicle." *Ringewold v Bos,* 200 Mich App 131, 134; 503 NW2d 716 (1993).

To determine whether a person not holding title, or leasing the vehicle, may still be one of multiple "owners," courts look to whether the person used "the vehicle in ways that comport with concepts of ownership." *Detroit Med Ctr v Titan Ins Co,* 284 Mich App 490, 492; 775 NW2d 151 (2009). "[O]wnership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another." *Id.* at 493 (citation omitted). In *Detroit Med Ctr,* 284 Mich App at 493-494, the panel found that Jimenez was not an owner of the vehicle in question, where she had to ask for permission and be given the keys each time she wanted to use it. Title was in the name of another person, Gonzalez, who

may have lived with Jimenez. Although Gonzalez never denied Jimenez access to the vehicle, the panel concluded that "[t]here was no transfer of a right of use, but simply an agreement to periodically lend. The permission was not for a continuous 30 days, but sporadic." *Id.* at 493.

The Court of Appeals followed *Detroit Med Ctr* in *Harrell v Titan Indemnity Co*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2015 (Docket No. 318744) (Ex. D).[10] There, the panel held that "Harrell's use of the vehicle did not comport with concepts of ownership. Harrell testified that Livingston purchased the vehicle, titled the vehicle, and kept the vehicle's only set of keys on his person. She testified that Livingston periodically lent her the vehicle, but would occasionally deny her permission to use the vehicle. Livingston testified that he lent Harrell the vehicle at least once a week, but that he would not let her borrow it under certain circumstances." *Harrell*, unpub op at 3.

Here, Paul Dye likewise did not use the 1997 BMW in any "ways that comport with concepts of ownership." *Detroit Med Ctr*, 284 Mich App at 492. Although Matthew Dye owned the vehicle for approximately two months prior to the accident, *Paul Dye had no recollection of ever driving it.* (Ex. A attached to Dye's Cross-Application, pp 8-9.) Paul Dye testified that if he had ever had a reason to use the 1997 BMW, he would have certainly asked Matthew's permission. (See Ex. 2 attached to GEICO's Cross-Application, p 15.) Paul did not have a set of keys. (Id.) Paul had no recollection of the vehicle ever being garaged at his home. (Id.) Paul did not provide any of the funds for the purchase of the 1997 BMW. (Id.) And as noted above, Matthew testified that he purchased the 1997 BMW with his own money, that he paid for all of the vehicle's fuel, that he would have paid for the maintenance had he owned the vehicle long

[10] On April 15, 2016 this Court denied leave in *Harrell*, after conducting a "mini-oral argument" on the application, 499 Mich 899; 877 NW2d 155 (2016).

enough, that the vehicle was never garaged at his father's house, and that his father did not have a set of keys. (Id.).

Although Paul testified that *he thought* Matthew *would have* let him use the 1997 BMW, this testimony is entirely speculative, since Paul never actually had a need to do so. (Ex. 2 attached to GEICO's Cross-Application, p 15.) Indeed, Paul acknowledged that at any given time, Matthew could have been using the 1997 BMW to get back and forth to work, or transport his three children, and that Matthew's use of the vehicle for these purposes would have taken priority over any need that Paul might have had (but never actually did) to use the vehicle. (Id.) Evidence or testimony that is speculative does not create a genuine issue of material fact, and is insufficient to avoid summary disposition under (C)(10). See *Bennett v Detroit Police Chief,* 274 Mich App 307, 319; 732 NW2d 164 (2006) ("parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact"); *Hampton v Waste Management of Michigan, Inc,* 236 Mich App 598, 601-602; 601 NW2d 172 (1999). Moreover, this testimony does not create a genuine issue of material fact, because at best, it would establish a mere "agreement to periodically lend," i.e., "permission [that] was not for a continuous 30 days, but sporadic." *Detroit Med Ctr,* 284 Mich App at 493-494.

Below, Plaintiff pointed to Matthew Dye's testimony that he considered his father an "owner" of the 1997 BMW (based upon Plaintiff's counsel's definition of "ownership"). (See Ex. 2 attached to GEICO's Cross-Application, p 16.) But a party opposing a (C)(10) motion must rely upon admissible evidence. *SSC Associates Ltd Partnership v General Retirement*

System of City of Detroit, 192 Mich App 360, 364; 480 NW2d 275 (1991).[11] "[T]he issue of ownership is a legal conclusion within the court's domain…" *In re Phillips*, 491 BR 255, 261 n 10 (Bkrtcy D Nev 2013). See also *State v Spence*, 768 NW2d 104, 111 (Minn 2009) ("ownership is a legal status"); *Johnson v Berry*, 171 F Supp 2d 985, 987 (ED Mo 2001) ("Co-ownership is a legal concept, however, not merely a factual assertion…."); *Beacon Mut Indem Co v Galliher*, 181 NE2d 292, 294 (Ohio App 1961) ("Ownership is a legal term and often a legal conclusion."). A witness is not to invade the province of the court by giving testimony regarding a question of law, or rendering legal conclusions and opinions. *People v Lyons*, 93 Mich App 35, 47; 285 NW2d 788 (1979). "Allowing witnesses to testify as to questions of law invites jury confusion and the possibility that the jury will accept as law the witness's conclusion rather than the trial judge's instructions." *Id.* "[I]t is the exclusive responsibility of the trial court," and not witnesses, "to find and interpret the law." *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54 (1996). Therefore, Matthew's testimony that his father was an "owner" of the 1997 BMW would be inadmissible and cannot create a genuine issue of material fact.

While the result compelled by *Barnes* may seem harsh, the outcome makes sense when viewed in light of the statute's objectives. Only an owner of a motor vehicle has the necessary proprietary and possessory usage of a motor vehicle in order to give rise to an insurable interest in the motor vehicle. Permitting any type of recovery consistent with the facts in the case at bar belies the legislative mandate that owners of motor vehicles bear responsibility for properly insuring vehicles in this compulsory system of insurance. It would encourage individuals with

[11] "The reviewing court should evaluate a motion for summary disposition" under (C)(10) by considering only "the substantively admissible evidence actually proffered in opposition to [or in support of] the motion." *Maiden*, 461 Mich at 121.

bad driving records, numerous moving violations, and repeated drunk driving offenses to continue driving on the roads while imperiling law abiding citizens. Insurers could not properly assess risk without disclosure of ownership interests and the garaging of vehicles, and in fact, would escape liability in cases such as the one at bar and shift the burden back to the government to make payment of benefits to an individual who failed to comply with the law. Further, it would allow and encourage individuals to have friends and/or family who reside in communities with lower insurance costs to procure insurance policies for those titled owners whose vehicles are garaged and used in communities with higher insurance costs. This was clearly not the intent of the Legislature as seen in the plain language of MCL 500.3101(1), which requires owners to maintain insurance on their vehicles and the exclusion for benefits for owners who do not properly maintain insurance on their own vehicles under MCL 500.3113(b).

Again, in order for Paul to be an "owner" of the 1997 BMW, his use must have been "proprietary" or "possessory," *Ardt*, 233 Mich App at 691, or as described in *Detroit Med Ctr*, 284 Mich App at 493-494, "regular" or "exclusive." The deposition testimony confirmed that Paul was not an owner of the vehicle –he did not hold title, he never drove it, would have asked Matthew's permission if he had driven it, and did not have a set of keys. Therefore, Paul did not use the 1997 BMW in any "ways that comport with concepts of ownership." *Detroit Med Ctr*, 284 Mich App at 492. At most, the testimony reflects a mere "agreement to periodically lend," i.e., "permission [that] was not for a continuous 30 days, but sporadic." *Id.* at 493-494.

Matthew Dye also pointed to the supposed history of Paul and Matthew sharing vehicles, and the Court of Appeals majority found this to be relevant. (Ex. A attached to Dye's Cross-Application, p 9.) But it is undisputed that no such history existed with respect to the 1997 BMW. Moreover, these is no precedential or textual basis for considering an individual's use of

other vehicles, when analyzing ownership. All that matters under Court of Appeals precedent is whether Paul Dye had "proprietary" or "possessory"[12] use *of the 1997 BMW*, or whether his use *of the 1997 BMW* was "regular" or "exclusive."[13]

Matthew Dye's position relied heavily upon *Twichel*, 469 Mich at 524. However, the Court of Appeals factually distinguished *Twichel*, under circumstances far more analogous to the present case, in *Detroit Med Ctr*, 284 Mich App at 492, 494, a decision that Dye wholly ignored in the Court of Appeals. In *Detroit Med Ctr*, 284 Mich App at 493-494, the panel found that Jimenez was not an owner of the vehicle in question, where she had to ask for permission and be given the keys each time she wanted to use it. Title was in the name of another person, Gonzalez, who may have lived with Jimenez. Although Gonzalez never denied Jimenez access to the vehicle, the panel concluded that "[t]here was no transfer of a right of use, but simply an agreement to periodically lend. The permission was not for a continuous 30 days, but sporadic." *Id.* at 493. The *Detroit Med Ctr* panel found that "[t]he need for permission distinguishe[d] this case from" *Twichel*, and the panel further noted the "lack of any evidence of regular use…." *Detroit Med Ctr*, 284 Mich App at 494. Here, the "need for permission" is established by the testimony of both Paul and Matthew Dye.

CONCLUSION AND RELIEF REQUESTED

The No-Fault Act requires the "owner or registrant of a motor vehicle" to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." *Barnes*, 308 Mich App at 6. "The no-fault act sets forth a consequence in the event that the required insurance is lacking." *Id.* Specifically, MCL 500.3113(b) provides that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily

[12] *Ardt*, 233 Mich App at 691.
[13] *Detroit Med Ctr*, 284 Mich App at 493-494.

injury if at the time of the accident…[t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 or MCL 500.3103 was not in effect." Here, it is undisputed that Plaintiff Matthew Dye was the owner of the 1997 BMW that he was driving when he was involved in the September 26, 2013 accident. Although the 1997 BMW admittedly was insured by Matthew's father, the Court of Appeals definitively held in *Barnes*, 308 Mich App at 8, that owners cannot "avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance." In other words, "under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits." *Barnes*, 308 Mich App at 8-9. Therefore, under *Barnes*, the insurance purchased by Paul Dye – which named only Paul Dye as an insured (Ex. 1, p 2) – does not allow Matthew Dye to "avoid the consequences of MCL 500.3113(b)."

As recognized by Judge O'Connell, who dissented in the Court of Appeals, the testimony set forth above confirms that Paul Dye was not an owner of the vehicle – for example, he did not hold title, he never drove it, would have asked Matthew's permission if he had driven it, and did not have a set of keys. Therefore, Paul Dye did not use the 1997 BMW in any "ways that comport with concepts of ownership." *Detroit Med Ctr*, 284 Mich App at 492. At most, the testimony reflects a mere "agreement to periodically lend," i.e., "permission [that] was not for a continuous 30 days, but sporadic." *Id.* at 493-494. Because the 1997 BMW was not insured *by an owner*, GEICO is entitled to summary disposition.

For these reasons, GEICO respectfully requests that this Supreme Court deny Matthew Dye's Cross-Application and grant GEICO's Cross-Application for Leave to Appeal or alternatively, enter peremptory relief granting GEICO's Motion for Summary Disposition.

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INDEX OF EXHIBITS

Exhibit 1	April 4, 2017 Court of Appeals opinion
Exhibit 2	GEICO's Court of Appeals Brief as Appellant
Exhibit 3	*Harrell v Titan Indemnity Co*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2015 (Docket No. 318744)